(30)

IN THE

Supreme Court of the United States

OCTOBER TERM—1944

No. 1068

EDNA BENTON WAKE WYMAN and EDWARD B. BARTLETT, as Executors under the Last Will and Testament of Edward E. Wyman, deceased,

Petitioners,

against

PAN AMERICAN AIRWAYS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

ROBERT E. COULSON,
Counsel for Petitioners.

ROBERT B. KNOWLES,
BENJAMIN H. SIFF,
Of Counsel.

ADAMS PRESS, 82 Beekman Street, New York City. WOrth 2-0061

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, EDNA BENTON WAKE WYMAN and EDWARD B. BARTLETT, as Executors under the Last Will and Testament of Edward E. Wyman, deceased, respectfully pray for a Writ of Certiorari to review the final judgment of the Supreme Court of the State of New York, wherein it was adjudged that the liability of the respondent for the wrongful death of petitioners' testate under "Death on the High Seas Act" (Title 46, United States Code, Section 761) was limited to $8,300.00 pursuant to Article 22 of the Convention for the Unification of Certain Rules Relating

to International Transportation by Air, and Additional Protocol signed at Warsaw, Poland, October 12, 1929 (otherwise known as the Convention of Warsaw), and which Convention was adhered to on behalf of the United States of America by proclamation of the President, dated October 29, 1934 (49 Stat., Pt. 2, at p. 3000).

OPINIONS OF THE COURTS BELOW

Opinion of the Supreme Court of the State of New York, County of New York, Schreiber, *J.*

(Pages 122 to 124 of the Record, reported in 43 N. Y. Supp. 2d, 420)

"Wyman (Edward E. Wyman, dec'd) *v.* Pan American Airways, Inc.—Plaintiffs' testator, enroute from San Francisco to Hongkong as a passenger on board the 'Hawaii Clipper,' was lost in the disappearance without trace of that aircraft over the South Pacific Ocean on or about July 29, 1938. Defendants, now merged, owned and operated the plane.

The rights of the parties are fixed by the rules for 'International Air Transportation' established and concluded at Warsaw, Poland, on October 12, 1929, at a convention of nearly all governments, including the United States. Final adherence to this international treaty on the part of the United States was proclaimed by the President on October 29, 1934 (49 Statutes at Large, Part 2, p. 3000), which thus becomes part of the law of the land (United States Constitution, Art. VI; United States *v.* Belmont, 301 U. S., 324), superseding state law (Moscow Fire Ins. Co. *v.* Bank of N. Y., 280 N. Y., 286; Conklin *v.* Canadian Colonial Airways, 266 N. Y., 244). The said rules were made a condition of the ticket herein (Murray *v.* Cunard SS. Co., Lim.,

235 N. Y., 162) and in any event are so made under the rules themselves (Art. 3, subdiv. 2).

The Warsaw Convention rules are applicable only to international flights (Art. 1) and raise a presumption of liability on the part of the carrier for injury or death to a passenger (Arts. 17, 20) limited to 125,000 francs or approximately $8,300 under the rate of exchange fixed (Art. 22) except where the carrier is guilty of "wilful misconduct" (Art. 25).

There was no proof in this case of "wilful misconduct" on the part of the defendant (Wass *v.* Stephens, 128 N. Y., 123; Brown *v.* Garey, 267 N. Y. 167), and, indeed, no proof of any negligence connected with or a proximate cause of the accident (Kalinowski *v.* Ryerson & Son, Inc., 242 App. Div., 43, aff'd 270 N. Y., 532). Nor, in view of the circumstances, were defendants able to offer any proof in rebuttal of the presumption of liability (Art. 20).

The case at bar would thus seem to be within the very situation embraced by the rules of the Warsaw Convention which here operate to permit a recovery that otherwise might be impossible for want of proof. On these considerations at the conclusion of the trial, a verdict was directed for plaintiffs in the sum of $8,300, in accordance with the rules stated.

Plaintiffs now move to set aside this verdict as inadequate. It is said that, as the aircraft was lost on a leg of the flight between Guam and Manila, both within the jurisdiction of the United States, the flight was not international and the Warsaw Convention rules are inapplicable. The original place of departure, however, was San Francisco, California, U. S. A., and the final destination Hongkong, China. So the ticket purchased by the deceased reads. This is specifically controlling (Article 1, subdivision 2, Warsaw Convention) despite breaks in travel en route (Grein *v.* Imperial Airways, Ltd., [1930] 1 K. B. 50). The contention

that defendants failed to prove legal authorization to operate in also without merit. Compliance with the law is always to be assumed unless the contrary is proven. (Anderson *v.* Erie RR., 223 N. Y., 277).

There remains to be considered whether interest may be allowed on the judgment. The right to bring a death action is purely statutory. It did not exist at common law (Debevoise *v.* N. Y. L. E. & W. RR., 98 N. Y., 377) and depends upon the existence of a statute creating a right of action at the place where the "force impinged" causing injuries and death (Whitford *v.* The Panama R.R., 23 N. Y., 465; Kristansen *v.* Steinfeldt, 165 Misc., 575; reversed on other grounds (256 App. Div., 824). No new substantive rights were created by the Warsaw Convention and all the rules there laid down are well within the framework of existing legal rights and remedies (Choy *v.* Pan-American Airways Co., 1941 Am. Mar. Cas., 483).

The right to any recovery in this action thus must depend on some statute. The New York Decedent Estate Law (section 130) can have no application as the injury and death did not occur within the territorial confines of the state (Whitford *v.* The Panama R.R., *supra*). The only possible relevant statute, therefore, is the federal "Death on the High Seas Act" (Title 46, U. S. Code, section 761), similar in effect to other statutes giving such right of action. This statute is applicable to airplane accidents on the high seas (Choy *v.* Pan-American Airways Co., *supra*) and that an action thereon may be maintained in the state courts has been held by the Appellate Division in this case (262 App. Div., 995). As the said statute contains no provision for interest, it follows that interest may not be allowed on the verdict herein (Murmann *v.* N. Y., N. H. & H. RR., 258 N. Y., 447; Norton *v.* Erie RR., 163 App. Div., 468). Motion to set aside the verdict is denied, and interest on the said verdict is disallowed."

The judgment of the Supreme Court, New York County, was affirmed by the Appellate Division of the Supreme Court of the State of New York without opinion in 267 App. Div. 947.

The Court of Appeals of the State of New York granted leave to appeal from the judgment by order dated June 14, 1944 (293 N. Y. 273).

The judgments were affirmed by the Court of Appeals of the State of New York without opinion by order dated December 30, 1944. The decision of affirmance is not yet reported.

Jurisdiction

The date of the decision of the Court of Appeals of the State of New York, of which review is here sought, is December 30, 1944. The remittitur of the Court of Appeals is dated December 30, 1944. The order making the order of affirmance of the Court of Appeals the order of the Supreme Court of the State of New York was entered in the Supreme Court of the State of New York, County of New York, on the 15th day of January, 1945. Judgment on the remittitur was entered in the Supreme Court of the State of New York on the 25th day of January, 1945.

The jurisdiction of this Court is invoked under Judicial Code, Section 237, (a) and (b), United States Code, Title 28, Section 344(b). There is here involved the interpretation to be given to a Treaty of the United States of America, to wit: the Warsaw Convention, which respondent claimed granted to it a partial immunity from liability. The treaty was specifically pleaded in the answer of the respondent and was the sole basis of decision from which review is sought.

The Treaty Involved

The treaty involved is the Convention for the Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol signed at Warsaw, Poland, October 12, 1929 (otherwise known as the Warsaw Convention) and which Convention was adhered to on behalf of the United States of America by proclamation of the President, dated October 29, 1934 (49 Stat., Pt. 2, at p. 3000).

Article 22 of the Convention provides:

> "(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs.* Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.
>
> * $8,291.87 at par of $.066335
>
> (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs* per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.
>
> * $16.58 at par of $.066335
>
> (3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs* per passenger.
>
> * $331.67 at par of $.066335

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

Article 25 provides:

"(1) The carrier shall not be entitled to avail himself of the provisions of this Convention, which exclude or limit his liability if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to willful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

Summary Statement of Matter Involved

The action was one for the wrongful death of Edward E. Wyman, who perished by reason of an airplane accident during a flight from Guam to Manila in 1938.

In July of 1938, the respondent owned and operated the airplane "Hawaii Clipper" as a carrier of passengers for hire between Alameda, California, and Hongkong, a British Crown Colony in China (fol. 110).

The deceased booked passage on the plane for a flight scheduled to leave Alameda, California, for Hongkong, China, on July 23rd (Petitioners' Ex. 1, p. 100). The ticket was purchased in New York (fol. 113). The back of the ticket issued to the testate bore the following legend (Petitioners' Ex. 26, at p. 120 of the Record):

"7. Transportation hereunder shall be subject to the rules relating to liability established by the Con-

vention of Warsaw on October 12, 1929 if such Convention, by its terms, is applicable thereto."

One of the rules of the Warsaw Convention, Article 22, provides that by special contract the carrier and the passenger may agree to a higher limit of liability than the 125,000 francs provided for.

It was conceded at the trial that there was no choice of rates available to prospective passengers whereby one could obtain passage with limits of liability higher than the 125,000 francs or with full liability (fols. 228 and 229 of the Record).

The proof shows that shortly before the plane departed, it underwent an inspection at the respondent's shop in Alameda where it was found that there were "excessive gas leaks and water leaks into front and aft bilges" (fol. 189). The respondent's report stated with respect thereto: "Test seawings and repair as required." The situation was ostensibly remedied (fol. 189) and the ship permitted to depart.

The next stop on the flight was Honolulu, about 2,500 miles away. When the plane arrived there, a check-up revealed that some eight gallons of gasoline had leaked into the bilges (fols. 190, 191).

Apparently nothing was done to remedy the conditions causing the leaks, for when the plane arrived at Wake Island, approximately 2,500 miles away from Honolulu and after an intermediate stop at Midway, 1,300 miles from Honolulu, a check-up once more revealed that gasoline had leaked into the bilges, totalling some four gallons (fols. 193-195). The ship was dispatched onto its next stopping point, the Island of Guam, 1,700 miles away. When it arrived there, once again it was discovered that gasoline had leaked into the bilges, about two gallons (fol. 201). Once more the ship was dispatched on its way to the next stop, Manila, and here again, as in the previous reports of

the presence of gasoline, no mention is made of any repairs referable to the condition responsible for the leaks.

When the plane left Guam for Manila, the weather forecasted was "widely scattered thunder showers over Archipelago" (Petitioners' Ex. 3, p. 112).

While on its journey from Guam to Manila, hourly radio messages were sent ~~by~~ the captain of the plane. These indicated that at intervals he was meeting with turbulent air, squalls, rain and lightning (fols. 158, 159, 160, 164, 170, 172, 173).

Normally, the flight from Guam to Manila is in a straight line (Petitioners' Ex. 4, p. 114; fols. 143, 144, 151). However, on the flight in question, and about the time that squally weather was encountered, the plane began to deviate from the prescribed course, southward (Petitioners' Ex. 4; fols. 146, 147, 148, 149, 163). Use of the southerly course was at the pilot's discretion (fol. 151), and apparently was followed when unfavorable weather conditions beset the normal course. The charted progress of the plane (Petitioners' Ex. 4) indicates that it never returned to the prescribed course.

Weather sequences were radioed from Guam and Manila to the navigator of the plane every half hour. When the fourteenth weather sequence of the journey was radioed, the plane replied to hold it up as it was in rain and clouds and was being bothered by rain static (fol. 173). A few minutes later a second attempt was made to radio the fourteenth weather sequence to the plane, and once more the plane replied to hold it up because of rain and static (fol. 173). That was the last message from the plane. It disappeared, and no trace of it or its occupants was ever found.

The petitioners proved that free liquid gasoline, such as was present in the seawing bilges, generates gasoline vapor which is highly flammable and explosive in character. The

quantity of gasoline vapor generated over free gasoline is wholly independent of the amount of liquid gasoline present (fol. 213). Given an igniting agent, a pint of free gasoline can yield sufficient vapor to cause an explosion equal in destructive effect to a pound of dynamite (fols. 212, 213, 214).

It was conceded that any spark at all could be such an igniting agent (fol. 278). Counsel for the defendant at first conceded that there were innumerable causes in a traveling airplane for the creation of a spark (fol. 277), but then withdrew that concession (fol. 278). Petitioners thereupon offered to prove the variety of ways in which a spark could be initiated in a traveling airplane (fol. 280). The Court stated that petitioners could do so if it became necessary (fol. 281).

In any event, some of the causes for sparks may be gleaned from Petitioners' Exhibit 23, which is an extract from a manual issued by the manufacturer of the airplane in question (fol. 221). The extract reads, as follows (fols. 222, 223):

> "Extreme care must be taken to prevent sparks from electrical apparatus, static electricity, shoes and other causes * * *."

Petitioners contended that, assuming even the applicability of Article 22 of the Convention, the foregoing presented proof of willful misconduct within the purview of Article 25 of the Warsaw Convention which, if found by a jury, would have made unavailing the limited liability provisions of Article 22.

Respondent rested at the conclusion of petitioners' proof, and moved for a directed verdict in petitioners' favor in the sum of $8,300.00, the amount limited by the Convention, and moved to dismiss so much of petitioners' claim as exceeded that amount (fols. 291, 293).

The Trial Justice held that Article 22 of the Warsaw Convention was controlling, and as is apparent from its citation of authority, interpreted the words "willful misconduct" of Article 25 to mean "intended injury" so as to make that Article inapplicable (opinion of Trial Court, fols. 366-367). In its holding that Article 22 is controlling and in its interpretation of willful misconduct contemplated by Article 25, the Trial Court was sustained by the Appellate Division and the Court of Appeals.

Reasons for Issuance of Writ

(1) The Court of Appeals of the State of New York has decided a highly important case in which it necessarily passed upon the applicability of a partial immunity from liability granted by the Warsaw Convention, a treaty of the United States. Apart from the fact that several actions are already pending in the courts of the State of New York, in which the Warsaw Convention has been pleaded as a partial defense, the undoubted increase of airplane traffic after the war will involve frequent attempted applications of the limited liability provisions of the Warsaw Convention. There should be, therefore, a final authoritative disposition of the meaning and application of the Warsaw Convention with respect to the limitation of liability of common carriers engaged in international carriage by air.

(2) This is the first time that the question of the applicability of the Warsaw Convention was presented to the State Court of Appeals, and if this Court grants certiorari, it will be the first time that this Court will consider the question of the meaning to be given to the Warsaw Convention, particularly with respect to Articles 22 and 25, dealing with limitation of liability.

(3) The decision of the Supreme Court of the State of New York as affirmed by decision of the Court of Appeals of the State of New York with respect to the requirement of notice to a passenger that he is traveling under a limited liability contract is in conflict with the decisions of this Court, and in petitioners' opinion, directly in conflict with the decision of this Court in the case of Kensington, 183 U. S. 263; and Majestic, 166 U. S. 375.

Dated, March 16, 1945.

EDNA BENTON WAKE WYMAN and EDWARD B. BARTLETT, as Executors under the Last Will and Testament of Edward E. Wyman, deceased,

Petitioners.

By ROBERT E. COULSON,
Counsel for Petitioners.

IN THE

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PAN AMERICAN AIRWAYS, INC.,

Respondent.

BRIEF IN SUPPORT OF THE MOTION

Opinions of the Courts Below

The opinions of the Courts below are found in the petition, and for the sake for brevity, are not repeated here.

Jurisdiction and Statement of the Case

The jurisdictional basis for the petition and statement of the case is found in the petition, and for the sake of brevity, are not repeated here.

Specification of Errors

1. The Supreme Court of the State of New York, as well as the Court of Appeals of the State of New York, erred in holding that the common law of New York that before a contract of transportation by a common carrier calling for limited liability, can be binding, a choice of a contract with full liability must be given to the passenger, was abrogated by Article 22 of the Warsaw Convention; and that the common law of New York holding that notice must be given to the passenger that he is traveling under a limited liability contract before such limited liability can be availed of, must be clearly given to the passenger.

2. The Supreme Court of the State of New York and the Court of Appeals of the State of New York erred in interpreting Article 25 of the Warsaw Convention.

3. The Supreme Court of the State of New York and the Court of Appeals of the State of New York erred in limiting the respondent's liability.

ARGUMENT

POINT I

The limitation of liability provided for by the Warsaw Convention was not binding in the case at bar because a choice of contracts was not offered to deceased whereby he could obtain passage without limited liability.

The law of New York is that before a contract of limited liability in the transportation of passengers of a common carrier can be valid and binding on the passenger, there must be offered to him a choice of contracts whereby he can obtain passage with full liability (*Conklin* v. *Canadian Colonial Airways*, 266 N. Y. 244, 247, 248; *Straus & Co.* v. *Canadian Pacific R. Co.*, 254 N. Y. 407, 414; *Kil-*

thau v. *International Mercantile Marine Co.*, 245 N. Y. 361; *Burke* v. *Union Pacific R. Co.*, 226 N. Y. 534).

It is also the law of the State of New York that the limited liability provisions of a transportation contract can become binding on the passenger only in the event of his knowing its provisions (*Aplington* v. *Pullman Co.*, 110 App. Div. 250).

It was conceded in the case at bar that there was no choice of contracts available to prospective passengers whereby one could obtain passage with full liability as well as limited liability.

The Supreme Court of the State of New York, as well as the Court of Appeals, held that Article 22 inhibited the application of the New York rule with respect to choice of contracts. Apart from any other considerations, the Warsaw Convention itself specifically permits the application of the New York rule. Article 22, subdivision 1, provides in part:

> "• • • Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

It is obvious from the foregoing sentence, that the framers of the Warsaw Convention, themselves, recognized that an outright and inflexible limitation of liability would be inconsistent with well-established rules of law concerning the propriety of such a limitation.

Why else should the Warsaw Convention provide for the contingency of contracts of carriage in which liability could be provided for in any amount higher than $8,300.00?

That being so, the rule that treaties should be so construed, if possible, so as not to impair rights, operates to avoid the limitation when, as in this case, it is conceded that no choice of contracts was offered to the passenger whereby he could obtain passage without limited liability.

Moreover, nothing on the ticket purchased by the deceased would indicate to him that there was a possible choice of contracts which would entitle him to carriage with full liability. The ticket merely says that the transportation is governed by the rules of liability promulgated by the Warsaw Convention. Nothing is said in the ticket what the terms of the Warsaw Convention are. Nothing is said in the ticket where copies of the Warsaw Convention may be obtained for perusal. Nothing is said in the ticket, directly, that there is a choice open to the passenger of different contract. In fact, the language of the ticket does not even say that there is a limitation of liability. All it says is that the transportation is subject to the rules of liability as promulgated by the Warsaw Convention. Rules of liability may mean the Statute of Limitations, may mean procedural steps to be followed, may mean requirements for notice. By no interpretation of language can it be said that the passenger is clearly and unequivocally informed that he is being transported pursuant to a contract of limited liability. This complete absence of notice to the passenger that he is travelling under a limited liability contract, vitiates, it is submitted, the effectiveness of the limitation, even though created by a treaty.

In that connection, the Court's attention is respectfully called to the following. The ticket provides (Petitioners' Ex. 26): That the transportation is subject to the rules relating to liability established by the convention of Warsaw of October 12, 1929 if such convention, by its terms, is applicable thereto.

How is a passenger to know whether the Convention, by its terms, is applicable to the transportation in question?

Article 1, Subd. 2, of the Convention, defines international carriage as one where the place of departure and the place of destination are situated either within the territories of two high contracting parties, or within the terri-

tory of a single high contracting party, if there is an agreed stopping place within a territory subject to the sovereignty of another power, even though that power is not a party to the Convention. Thus, for a person to know whether the transportation in question is subject to the rules of the Warsaw Convention, he must know whether the point of departure and the point of destination are within territories of high contracting parties. The ticket yields no such information. And, if the passenger should turn to the original Warsaw Convention, he will discover that neither Hongkong, a British Crown Colony, nor the United States were high contracting powers. Therefore, neither the ticket nor the original Convention, itself, would enable the passenger to know that his transportation was an international one subject to the rules of liability of the Warsaw Conventon.

Article 38 of the Convention provides that after it has come into force, it remain open for accession by any state, and that accession shall be effected by a notification addressed to the Government of Poland, which in turn will inform the government of each of the high contracting parties, and that the accession takes effect as from the 90th day after such notification.

Assuming even that a passenger presumably knows that at some time after the adoption of the Warsaw Convention, the United States acceded to the Convention, is he also presumed to know that some time after the adoption of the Warsaw Convention, Great Britain in behalf of Hongkong acceded to the Convention; that Great Britain in behalf of Hongkong notified the Polish Government of its accession; that the Polish Government had notified the other high contracting parties of Hongkong's accession, and that ninety days had elapsed from the date of such notification?

All of the foregoing are essential facts that have to exist before the rules of the Warsaw Convention can apply to the transportation in question. For a passenger to know

them and be bound by them would pre-suppose a knowledge on his part not only of the treaties of the United States, but also of executive acts by the Government of Poland, and of treaties entered into by Great Britain in behalf of Hongkong. Such supposed knowledge exceeds anything that can be reasonably expected of a prospective passenger of an airplane, and in the absence of such knowledge, any limitations depending on it, cannot, it is submitted, be availed of.

POINT II

The willful misconduct set forth in Article 25 of the Warsaw Convention means gross negligence and not intended injury.

Petitioners *prima facie* established such willful misconduct on the part of the respondent. In the courts below, respondent urged that to establish willful misconduct within the purview of Article 25 of the Warsaw Convention, it was incumbent upon the petitioners to show that the death of their testator was caused by wrongful acts of the respondent, committed out of mere wantonness or lawlessness or with a willful purpose or deliberate design to inflict injury. That that was the interpretation given to willful misconduct by the Court is evident from its citation of authority (Court's opinion at fols. 366 and 367 of the Record). The authorities cited by the Court treat of situations involving Penal Statutes where intent to do a wrong or harm is a prime factor.

This contention stemmed from respondent's interpretation of the language of the original treaty which is in French, wherein the words translated by our State Department as "wilful misconduct" was the French noun "dol" and which, apparently, has no precise equivalent in the English language. It was argued that "dol" possessed

a connotation of deception, of fraud, of intended harm, and it was consequently urged that in the absence of proof of such deception or fraud or intended harm, there was a failure of proof on petitioners' part on the issue of wilful misconduct. It is submitted that the interpretation contended for is unjustified and erroneous.

Were the construction contended for by the respondent and applied by the Court, *i. e.*, designed harmful act, intended by the framers of the Warsaw Convention, they certainly could easily have expressed that concept in so many plain and unequivocal words. The failure to use words to express precisely the idea of designed harm bespeaks an intention to promulgate a rule not so narrow and restrictive, and this position is supported by the very proceedings at the Convention.

Sir Alfred Dennis, the English delegate at the Convention, said (Record of Proceedings, bottom of p. 40):

> "We have in my Country the expression, 'wilful misconduct', I think that it covers all you want to say; it covers not only acts done with deliberate purpose, but also acts of thoughtlessness without regard for the consequences."

And Dr. Goedhuis, in his authoritative work entitled "National Air Legislations and the Warsaw Convention," writes on page 275:

> "M. Walterbeek, President of the Legal Section of the Fifth International Congress of Air Navigation and one of the authors of the Warsaw Convention, declared that in the event of faute grave (grave or serious fault) of the carrier or one of his agents, the carrier would not be able to avail himself of the limitation of liability established in the Warsaw Convention." (Cf. Minutes of the Fifth International Congress of Air Navigation, page 1173.)

In an exhaustive article entitled "The Air Carrier's Liability to Passengers in International Law" (1936 Air

Law Review, p. 25), the author, Mr. Lincoln H. Cha, points out (p. 57) that the framers of the Convention, instead of using the words "acte illicit intentionell" (intentional illegal act), used the word "dol." He states, citing French authorities on the point, that "The term 'dol' in French includes gross fault (la faute lorde in French or culpa lata, in Latin)."

Mr. Cha also states (1936 Air Law Review, 25, 58) that a proposal that the unavailability of limited liability be restricted to acts deliberately designed to injure, was rejected by the framers of the Convention.

And surely, were "dol" to have the meaning now urged, "intended harmful act," our State Department and the British Parliament (the English equivalent statute, British Carriage By Air Act, 22 and 23, Geo. V. c. 36 (1932) likewise uses the words "willful misconduct") could have made that narrow special meaning unmistakably clear.

The foregoing certainly negatives the contention argued for by the respondent.

The Warsaw Convention is not a penal statute. It is a treaty defining contractual rights, contractual obligations and contractual duties. In such circumstances, to inject into the case a criminal concept of intentional harm is to do the grossest kind of violence to the subject matter of the compact.

A further indication of the fact that no criminal concept was intended by the framers of the Convention is the provision in Article 25 thereof that a carrier cannot avail itself of limited liability where the damage is caused by wilful misconduct "or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." The use of the word "default" certainly belies any inference that what was contemplated by the statute as a

basis for avoiding limited liability was only such conduct as would constitute deliberate and intentional wrong almost tantamount to a crime. The word "default" is defined in Webster's dictionary as "failure to do what is required by duty or law, neglect." It will be hardly argued that encompassed in this definition is any concept of designed or intended injury. To expand the plain meaning of the word "default" so as to include the idea of designed or intended injury, is to go far beyond all permissible limits of statutory construction.

The term "willful misconduct," when applied to civil actions, has been judicially defined by many courts. These definitions disclose that the word "willful," when used in a civil case, does not connote any intention to injure or any malice or anything criminal but signifies merely that the actor knows or should know that his conduct or failure to act, if persisted in, is likely to cause harm to another.

Sorrel v. *White*, 153 Atl. 359 (Vermont), at p. 362;
Jones v. *Hathway*, 70 Pac. 2nd 681 (California), p. 683;
Allison Coal and Transfer Co. v. *Davis*, 221 Ala. 334, at p. 336;
Davis v. *M'Cree*, 299 Fed. 142, 145;
Sabel v. *Chicago & N. W. R. R. Co.*, 255 Mich. 548, 553.

In view of the duty of a common carrier of passengers by air to exercise the highest vigilance and care with respect to the maintenance and equipment used in the transportation of its passengers (Fixel, The Law of Aviation, Chapter 7, Section 6; *Boulineaux* v. *City of Knoxville*, 99 Southwestern, Section 557; *Nysted* v. *Wings, Ltd.*, 1942 United States Aviation Reports 120, 126; Section 01.720 of the Civil Air Regulations of the Department of Commerce of the United States), the conduct of the respondent in dispatching an airplane onto a long journey in a condition

where it continuously leaked gasoline, *prima facie* establishes willful misconduct within the purview of Article 25 of the Warsaw Convention. It is misconduct to send out an unairworthy plane, which a plane uninterruptedly leaking highly flammable gasoline undoubtedly is, on a long journey and it is willful misconduct to do so knowingly. Particularly is this true when one of the minimal requirements of airworthiness, as promulgated by statute, is that gasoline tanks shall be so designed and their rivets and welds so located as to resist vibration failures or leakage (Sections 04.00 and 04.623 of the Civil Air Regulations of the United States Department of Commerce).

That the gasoline which leaked came from the tanks, can hardly be denied. Given an airplane with a fuel tank containing gasoline and given a gasoline leak into other parts of the airplane, the only inference possible is that the gasoline leaked from the fuel tank, particularly in view of the recurring nature of the incident.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its appellate jurisdiction; and that to such an end, a writ of certiorari should issue to the Supreme Court of the State of New York.

Dated, March 16, 1945.

ROBERT E. COULSON,
Counsel for Petitioners.

ROBERT B. KNOWLES,
BENJAMIN H. SIFF,
Of Counsel.

IN THE

Supreme Court of the United States

October Term—1944

No. 1068

EDNA BENTON WAKE WYMAN and EDWARD B. BARTLETT, as Executors under the Last Will and Testament of EDWARD E. WYMAN, deceased,
Petitioners,

against

PAN AMERICAN AIRWAYS, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DONALD HAVENS,
Counsel for Respondent,
80 Broad Street,
New York 4, N. Y.

EDGAR R. KRAETZER,
DAVID L. CORBIN,
Of Counsel.

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Statement.

Petitioners, as Executors of Edward E. Wyman, deceased, seek a writ of certiorari to review a decision of the Court of Appeals of the State of New York, affirming a decision of the New York Supreme Court directing a verdict for $8,300 in petitioners' favor in an action resulting from the death of their testator, who was a passenger on the aircraft "Hawaii Clipper" which disappeared without trace in the Pacific Ocean between Guam and Manila, P. I., July 29, 1938. The decision of the Trial Court is reported in 181 Misc. 963, 43 N. Y. S. (2d) 420, and appears at folios 364-372 of the Record. It was unanimously affirmed without opinion, both by the Appellate Division of the Supreme

Court, 267 App. Div. 947, and by the New York Court of Appeals, 293 N. Y. 878.

The decedent was enroute from San Francisco to Hong Kong (Plaintiffs' Exs. 1, 2 and 26). His transportation was subject to the Warsaw Convention,* 49 Stat. pt. 2, pp. 3000 *et seq.*, an international treaty regulating and limiting the rights of passengers and carriers in international air transportation. The Convention provides that the carrier shall be liable for death or injury of a passenger during such transportation unless the carrier proves that it took all necessary measures to avoid the damage (Articles 17, 20). Article 22, however, limits the carrier's liability to 125,000 gold francs (approximately $8,300) per passenger unless, as provided in Article 25, the damage is caused by the wilful misconduct of the carrier or his agents.

The Lower Court held (1) that there was "no proof in this case of 'wilful misconduct' on the part of the defendant", and (2) *that there was "indeed, no proof of any negligence connected with or a proximate cause of the accident"* (f. 367), but in view of the presumption of liability created by the Convention, directed a verdict in favor of petitioners for $8,300. The Court said (f. 368):

> "The case at bar would thus seem to be within the very situation embraced by the rules of the Warsaw Convention which here operate to permit a recovery that otherwise might be impossible for want of proof. On these considerations at the conclusion

* The Convention is officially entitled "The Convention for the Unification of Certain Rules Relating to International Transportation by Air, and Additional Protocol." It was signed at Warsaw October 12, 1929, and has been ratified or adhered to by substantially all of the leading commercial nations of the world, among them the United States, as well as Great Britain and her colonies, including Hong Kong. See *A List of Treaties and Other International Acts of the United States in Force on December 31, 1941*, page 126, published by the Department of State in 1944, Publication No. 2103.

of the trial, a verdict was directed for plaintiffs in the sum of $8,300, in accordance with the rules stated."

The Facts.

Petitioners' statement of facts is highly colored by references to leakages of gasoline into the sea wing bilges and to the fact that the pilot mentioned the presence of rain and lightning in some of his radioed reports on the final flight, the inference being that gasoline was ignited causing the plane to explode, thus explaining the disappearance.

The Court held that the evidence of leakages of gasoline was not sufficient to justify even an inference of ordinary negligence, stating (ff. 290-291):

> "I cannot permit this jury to conjecture or guess that it was because of leaks caused by faulty construction of the tanks that this catastrophe occurred. There is nothing in the case from which they can reasonably infer that the gas was caused to ignite or that whatever occurred was because of the defendant's employees' negligence."

The evidence on the subject was as follows: At certain of the intermediate stops made by the aircraft while en route across the Pacific Ocean, although not at all of them, small amounts of gasoline were found to be present in the sea wing bilges located inside two small wings projected outward from either side of the hull of the aircraft and forming the pontoons on which, with the hull, the aircraft was designed to rest on the water. Without discussing the evidence in detail, it is sufficient to point out that there was no evidence (1) that gasoline had ever leaked out of the airplane itself, (2) that gasoline was present in the sea wing bilges after the airplane left Guam, (3) that there was a spark or any likelihood of a spark which might have ignited gaso-

line inside the bilges, or (4) that, even assuming the unproved fact that gasoline had leaked from the tanks into the sea wing bilges at the time the aircraft disappeared, there was any greater danger of explosion from the presence of gasoline in the bilges than from its presence in the tanks themselves. In fact, Dr. Dingwall, an expert called by the petitioners to testify to the explosive properties of gasoline, said on this subject (ff. 208-209):

> "Q. And Dr. Dingwall, so far as the properties, the chemical properties of gasoline are concerned, do they vary in any way whether the gasoline or its vapor is found in the bilge of an airplane or in any other receptacle? A. They do not."

Petitioners refer at page 9 of the petition to the fact that the weather forecast previous to the plane's departure from Guam called for "widely scattered thundershowers over archipelago" (Plaintiffs' Ex. 3), but the archipelago, *i. e.*, the Philippine archipelago, was 400 miles distant from the position of the aircraft at the time of the final message (Plaintiffs' Ex. 4). They also call attention to the captain's reports of lightning in two of his hourly messages (ff. 159, 160), whereas the fact is that the only reports of lighting were contained in messages sent at 8 A. M. and 9 A. M. Guam time, more than five hours before the last message was received from the plane (Plaintiffs' Ex. 4). As the petitioners point out at page 9, the position reports received by radio indicate that the plane, probably because of adverse weather, deviated somewhat to the southward of the direct course several hours after leaving Guam. However, whatever weather conditions were encountered at the time of the deviation had evidently been successfully overcome, since at the time of the last message the plane had been traveling on a new course directly toward Manila for more than 200 miles (Plaintiffs' Ex. 4).

The plain facts are that the "Hawaii Clipper" vanished while traveling over a 1500-mile stretch of unbroken ocean, the cause of the disappearance is completely unknown, and no trace of the aircraft has ever been found. Under such circumstances the Court's ruling that the petitioners failed even to make out a case of ordinary negligence is unassailable.

POINT I.

The Warsaw Convention was applied for the benefit of the petitioners, not to their detriment.

Petitioners invoke the jurisdiction of the Court on the ground that there is here involved the interpretation of a treaty of the United States, and they claim that the treaty has been applied to deprive them of damages which they might otherwise have recovered. This is not the fact.

The fact is that the treaty was applied for the petitioners' benefit, not to their detriment. The Trial Court held that they had failed to make out even a case of simple negligence against the carrier. The Court said (f. 367):

> "There was no proof in this case of 'wilful misconduct' on the part of the defendant * * *, *and, indeed, no proof of any negligence connected with or a proximate cause of the accident* * * *." (Italics ours.)

See, also, the Court's statement at folios 290-291, quoted above at page 3.

But for the presumption of liability created by the treaty, the petitioners would have recovered nothing—a point that was emphasized by the Trial Court (f. 368). Having thus received the benefit of the treaty, the petitioners

are in no position to complain of its application. *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 487.

The Appellate Division and the Court of Appeals unanimously affirmed the decision, both without opinion. 267 App. Div. 947; 293 N. Y. 878. It would be the purest conjecture to surmise that the grounds of their decisions were any different from those expressed in the court of first instance.

POINT II.

Petitioners' contentions that the New York courts improperly construed Articles 22 and 25 of the Warsaw Convention are without substance.

Article 22 (1) of the Warsaw Convention provides:

> "(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. * * * Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

Petitioners infer that the provision authorizing the carrier and the passenger to agree to a higher limit of liability was adopted for the purpose of allowing carriers, when making contracts, to comply with any local law based on public policy requiring the carrier to give passengers a choice of rates. Having so inferred, the petitioners conclude that, because the Convention permits carriers to make a contract in accord with local public policy, they are required to do so, thereby converting a permissive into a compulsory provision. The argument is clearly without merit. It is perfectly obvious that the provision referred to simply expresses the intent of the framers of the Convention to leave the right of contracting as it stood before the treaty

was adopted. See *Railroad Co.* v. *Lockwood*, 17 Wall. (84 U. S.) 357, 361, and *Walker* v. *The Transportation Co.*, 3 Wall. (70 U. S.) 150, 155, discussing the effect of a similar clause in the statute limiting shipowners' liability in case of fire. Moreover, the provisions of the Convention, as the "supreme law of the land" (Const., Art. VI), necessarily override any local rules of public policy. *U. S.* v. *Belmont*, 301 U. S. 324, 327; *U. S.* v. *Pink*, 315 U. S. 203, 231-232. See, also, *The Amiable Isabella*, 6 Wheat. (19 U. S.) 1, 72-73.

Petitioners' suggestion (pp. 16-18) that because the passenger was not informed of the terms of the Convention or of the fact that it applied to the transportation in question, he was not bound thereby, is wholly without substance. The provisions of the Convention and the adherence of the British Government on behalf of Hong Kong were matters of public record. 49 Stat. 3000; U. S. State Dept. Treaty Information Bulletin No. 65, February, 1935, page 10. The petitioners' argument is, in effect, that their testator was not presumed to know the law. *Cf. Pettibone* v. *Cook County, Minnesota*, 120 F. (2d) 850, 854-855 (C. C. A. 8).

Petitioners' final contention, appearing in Point II of their brief, is that the expression "wilful misconduct" in Article 25 of the treaty should be construed to mean "gross negligence". As pointed out above, the Trial Court held not only that there was no proof of wilful misconduct, but that the petitioners had not even made out a case of ordinary negligence against the carrier (f. 367). These findings, amply supported by the evidence and already sustained by two appellate courts, are beyond the power of this Court to review. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 294. In any event, the authorities do not support petitioners' contention. See *Wass* v. *Stephens*, 128 N. Y. 123, 128-129; *Boyce* v. *Greeley Square Hotel Co.*, 228 N. Y. 106, 111; *Lewis* v. *Great West-*

ern Ry Co., 3 Q. B. Div. 195, 206, 213; Geodhuis, "National Air Legislations and The Warsaw Convention" (1937), pp. 274-275.

Conclusion.

The petition should be denied.

Respectfully submitted,

DONALD HAVENS,
Counsel for Respondent,
80 Broad Street,
New York 4, N. Y.

EDGAR R. KRAETZER,
DAVID L. CORBIN,
Of Counsel.